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Shuhada bt Alang Shukor v Khairul Anwar bin Shaharuddin

B

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCVC-87–07 OF 2019
FAIZAH JAMALUDIN J
11 NOVEMBER 2020

C

Moneylenders — Loan — Loan transaction — Plaintiff brought action against defendants for the repayment of loan — Whether the defendant signed the letters and surat aku janji — Whether the transaction between the plaintiff and defendants was a personal loan or investment — Whether the defendant signed the documents for the loan transaction — Whether the defendant owes the plaintiff the balance sum

D

Civil Procedure — Pleadings — Issue not pleaded — Whether the court should accept issues raised post-trial by defendant's counsel

E

This was a civil suit by the plaintiff against the defendant for the repayment of the sum of RM2,764,200 which the plaintiff's claimed she had loaned to the defendant, together with interest at the rate of 5%pa on the sum of RM2,764,200 from the date of filing of the writ until full settlement. The

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plaintiff's case was that she had, at the defendant's request, given the defendant a personal loan in the sum of RM2,844,000 and that the defendant had acknowledged receipt of the loan through two letters dated 16 March 2019 ('16 March letter') and 19 March 2019 ('19 March letter'). In the 16 March letter, the defendant acknowledged receipt of the sum of RM1,920,000 and

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RM450,000 from the plaintiff as a loan. In the 19 March letter, the defendant acknowledged receipt of the sum of RM474,000 as a loan from the plaintiff. The plaintiff pleaded that the defendant had paid part of the loan to the plaintiff and through a letter dated 23 June 2019 ('surat aku janji'), the defendant acknowledged that he still owed the plaintiff the sum of

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RM2,764,200. In his defence, the defendant denied having received the sum of RM2,844,000 from the plaintiff. The defendant also denied in his defence of having signed the 16 March letter, the 19 March letter and the *surat aku janji*. The defendant pleaded that he had only received the sum of RM1.3m from the plaintiff and that the sum was given by the plaintiff to him as an investment

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and not a loan. The defendant pleaded that out of the RM1.3m invested by the plaintiff with him, he had paid her returns in the sum of RM1,220,798. The agreed issues to be tried in this suit are; (a) whether the defendant had signed the 16 March letter, the 19 March letter and the *surat aku janji*; (b) whether the transaction between the plaintiff and the defendant was a loan or an

investment; and (c) whether the defendant still owed the plaintiff the sum of RM2,764,200. A

Held, allowing the plaintiff's claim and entering judgment against the defendant:

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(1) Section 67 of the Evidence Act 1950 stated that if a document was alleged to be signed or written by a person, the signature or handwriting of that person must be proved. As the defendant admitted during the trial that he had signed the 16 March and the 19 March letters, and that he handwritten and signed the *surat aku janji*; accordingly, it was directly proven through the defendant's admission, that the defendant had signed the 16 March letter and the 19 March letter and that he had handwritten and signed the *surat aku janji* (see paras 9 & 14). C

(2) Section 73A(1) of the Evidence Act 1950 provided for the admissibility of a statement made in a document when the maker was called as a witness in the proceedings and he had personal knowledge of the matters dealt with the statement. Accordingly, based on the statements in the 16 March letter, the 19 March letter and the *surat aku janji*, the defendant's admission during the trial, and the fact that no *perjanjian pelaburan* or *perjanjian usahasama* was entered between the plaintiff and the defendant; on the second issue to be tried, the court found that the transaction between the plaintiff and the defendant was a loan (see paras 16 & 21). D E

(3) As it was not disputed that no investment agreement or joint venture agreement has been entered between the defendant and plaintiff or a party named by her. Moreover, the defendant had agreed in the *surat aku janji* that the amount payable to the plaintiff is RM2,764,000. Additionally, under cross-examination, the defendant agreed that the amount payable to the plaintiff is RM2,764,000. He also admitted that although he undertook to pay the sum of RM2,764,000 by 2 July 2019 in the *surat aku janji*, he had not made paid the said sum to the plaintiff. The court found that the defendant still owes the plaintiff the sum of RM2,764,200 (see paras 28–30). F G H

(4) It was trite law that parties are bound by the pleadings and are not allowed to adduce facts and issues that were not pleaded. Similarly, in this instant case, if this court was to accept the unpleaded issues and allegation raised by defendant's counsel in his submissions post-trial, it would completely change the character of the defendant's defence to the plaintiff's claim and would be highly prejudicial to the plaintiff's claim. For this reason, both the unpleaded issues and allegation are rejected (see paras 44–45). I

[Bahasa Malaysia summary

Ini adalah tuntutan sivil oleh plaintif terhadap defendan bagi pembayaran balik sejumlah RM2,764,200, yang didakwa oleh plaintif telah pinjamkan oleh beliau kepada defendan, bersama-sama faedah pada kadar 5% ke atas jumlah RM2,764,200 dari tarikh pemfailan writ saman sehingga penyelesaian penuh. Kes plaintif adalah bahawa beliau telah, atas permintaan defendan, memberikan pinjaman peribadi kepada defendan dengan jumlah RM2,844,000 dan bahawa defendan telah mengakui penerimaan pinjaman tersebut melalui dua surat bertarikh 16 Mac 2019 ('surat 16 Mac') dan 19 Mac 2019 ('surat 19 Mac'). Dalam surat 16 Mac, defendan mengakui penerimaan sejumlah RM1,920,000 dan RM450,000 dari plaintif sebagai pinjaman. Dalam surat 19 Mac pula, defendan mengakui penerimaan sejumlah RM474,000 sebagai pinjaman dari plaintif. Plaintif memplidkan bahawa defendan telah membayar sebahagian pinjaman tersebut kepada plaintif dan melalui surat bertarikh 23 Jun 2019 ('surat aku janji'), defendan mengakui bahawa beliau masih berhutang kepada plaintif sejumlah RM2,764,200. Dalam pembelaannya, defendan menafikan telah menerima sejumlah RM2,844,000 dari plaintif. Defendan juga menafikan dalam pembelaannya bahawa telah menandatangani surat 16 Mac, surat 19 Mac dan surat aku janji. Defendan memplidkan bahawa beliau hanya menerima sejumlah RM1.3 juta dari plaintif dan bahawa jumlah tersebut diberikan oleh plaintif kepada beliau sebagai pelaburan dan bukannya pinjaman. Defendan memplidkan bahawa daripada jumlah RM1.3 juta yang dilaburkan oleh plaintif kepadanya, beliau telah membayar beliau pulangannya berjumlah RM1,220,798. Isu-isu yang dipersetujui untuk dibicarakan dalam tuntutan semasa adalah: (a) sama ada defendan telah menandatangani surat 16 Mac, surat 19 Mac dan surat aku janji; (b) sama ada transaksi antara plaintif dan defendan adalah pinjaman atau pelaburan; dan (c) sama ada defendan masih berhutang kepada plaintif dengan jumlah RM2,764,200.

Diputuskan, membenarkan tuntutan plaintif dan penghakiman dimasukkan terhadap defendan:

(1) Seksyen 67 Akta Keterangan 1950 menyatakan bahawa jika sesuatu dokumen dikatakan telah ditandatangani atau telah ditulis oleh mana-mana orang, tandatangan atau tulisan tangan orang itu hendaklah dibuktikan. Sepertimana yang telah diakui oleh defendan semasa perbicaraan bahawa beliau telah menandatangani surat 16 Mac dan 19 Mac, dan bahawa beliau telah menulis tangan dan menandatangani surat aku janji; oleh itu, ianya telah secara langsung dibuktikan melalui pengakuan defendan, bahawa defendan telah menandatangani surat 16 Mac dan surat 19 Mac dan bahawa beliau telah menulis tangan dan menandatangani surat aku janji (lihat perenggan 9 & 14).

(2) Seksyen 73A(1) Akta Keterangan 1950 memperuntukkan penerimaan

masuk pernyataan yang dibuat dalam dokumen apabila orang yang membuatnya dipanggil sebagai saksi dalam prosiding dan beliau mempunyai pengetahuan peribadi mengenai perkara-perkara yang diperkatakan dalam pernyataan tersebut. Oleh itu, berdasarkan pernyataan dalam surat 16 Mac, surat 19 Mac dan surat aku janji, pengakuan defendan ketika perbicaraan, dan fakta bahawa tiada perjanjian pelaburan atau perjanjian usahasama dimasuki antara plaintif dan defendan; pada isu kedua untuk dibicarakan, mahkamah mendapati bahawa transaksi antara plaintif dan defendan adalah satu pinjaman (lihat perenggan 16 & 21).

(3) Oleh kerana ianya tidak dipertikaikan bahawa tiada perjanjian pelaburan atau perjanjian usahasama yang telah dimasuki antara defendan dan plaintif atau pihak yang dinamakan oleh beliau. Lanjutan itu, defendan telah bersetuju melalui surat aku janji bahawa jumlah yang harus dibayar kepada plaintif adalah RM2,764,000. Tambahan lagi, dalam pemeriksaan balas, defendan telah bersetuju bahawa jumlah yang harus dibayar kepada plaintif adalah RM2,764,000. Beliau juga telah mengakui bahawa walaupun beliau beraku janji untuk membayar jumlah RM2,764,000 pada 02 Julai 2019 dalam surat aku janji, beliau masih belum membuat pembayaran jumlah tersebut kepada plaintif. Mahkamah mendapati bahawa defendan masih lagi berhutang kepada plaintif sebanyak RM2,764,200 (lihat perenggan 28–30).

(4) Adalah undang-undang yang mantap bahawa pihak-pihak terikat dengan pliding dan tidak dibenarkan untuk mengemukakan fakta dan isu yang tidak diplidkan. Begitu juga, dalam kes semasa, sekiranya mahkamah ini menerima isu yang tidak diplidkan dan pengataan yang dibangkitkan oleh peguamcara defendan dalam penghujahannya setelah perbicaraan, ia akan mengubah keseluruhan ciri pembelaan defendan kepada tuntutan plaintif dan akan memprejudiskan tuntutan plaintif. Atas alasan ini, kedua-dua isu yang tidak diplidkan dan pengataan ditolak (lihat perenggan 44–45).]

Cases referred to

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Estate of Loh Ah Tong Loh Siew Lan v Tan Ah Eng [1949] Supp MLJ 33 (refd)
Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd [2019] 4 MLJ 141; [2019] 1 CLJ 183, FC (refd)
Patel v Mirza [2016] UKSC 42, SC (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944; [2018] 3 AMR 259, FC (refd)
Sarwan Singh Kundan Singh v Aminah Faudzar [2019] MLJU 1407; [2019] 1 LNS 1718; [2019] AMEJ 1431, HC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584; [2015] 5 AMR 584, FC (refd)

State (Delhi Administration) v Pali Ram AIR 1979 SC 14, SC (refd)
The Carbon Co Sdn Bhd & Anor v Ng Lee Hoon (conducting under 'Forest Wood Flooring') [2017] 4 MLJ 791; [2017] 6 CLJ 189, CA (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152; [1990] 1 CLJ Rep 330, SC (refd)

Legislation referred to

Contracts Act 1950 s 24
Evidence Act [IN]
Evidence Act 1950 ss 45, 47, 67, 73, 73A(1), 101
Financial Services Act 2013 ss 137, 137(1), 270
Rules of Court 2012 O 45 r 7

Zahidah Zakaria (GK Soh & Partners) for the plaintiff.
Mohd Ashri Rais (Mohd Ashri Rais & Co) for the defendant.

Faizah Jamaludin J:

INTRODUCTION

[1] This is a civil suit by the plaintiff against the defendant for the repayment of the sum of RM2,764,200, which the plaintiff claims she had loaned to the defendant, together with interest at the rate of 5%pa on the sum of RM2,764,200 from the date of filing of the writ until full settlement.

[2] During the trial, the plaintiff produced four witnesses, namely, the plaintiff herself ('PW1'), Amir'ul Shukry bin Kadri ('PW2'), Muhammad Norazam Shah bin Jamal ('PW3') and Masturah bt Omar ('PW4'). The defendant produced two witnesses, namely, the defendant himself ('DW1') and Rasiah bt Bukari ('DW2').

THE PLAINTIFF'S CASE

[3] The plaintiff's case is that she had, at the defendant's request, given the defendant a personal loan in the sum of RM2,844,000 and that the defendant had acknowledged receipt of the loan through two letters dated 16 March 2019 (the '16 March letter') and 19 March 2019 (the '19 March letter'). In the 16 March letter, the defendant acknowledged receipt of the sum of RM1,920,000 and RM450,000 from the plaintiff as a loan. In the 19 March letter, the defendant acknowledged receipt of the sum of RM474,000 as a loan from the plaintiff.

[4] The plaintiff pleads that the defendant had paid part of the loan to the plaintiff and through a letter dated 23 June 2019 ('surat aku janji'), the defendant acknowledged that he still owed the plaintiff the sum of RM2,764,200.

THE DEFENDANT'S CASE

[5] In his defence, the defendant denies having received the sum of RM2,844,000 from the plaintiff.

[6] The defendant also denies in his defence of having signed the 16 March letter, the 19 March letter and the *surat aku janji*.

[7] The defendant pleads that he had only received the sum of RM1.3m from the plaintiff and that the sum was given by the plaintiff to him as an investment and not a loan. The defendant pleads that out of the RM1.3m invested by the plaintiff with him, he had paid her returns in the sum of RM1,220,798.

ISSUES TO BE TRIED

[8] The agreed issues to be tried in this suit are: (a) whether the defendant had signed the 16 March letter, the 19 March letter and the *surat aku janji*; (b) whether the transaction between the plaintiff and the defendant was a loan or an investment; and (c) whether the defendant still owes the plaintiff the sum of RM2,764,200.

Whether the defendant signed the 16 March letter, 19 March letter and surat aku janji?

[9] Section 67 of the Evidence Act 1950 states that if a document is alleged to be signed or written by a person, the signature or handwriting of that person must be proved. Section 67 reads:

> If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting shall be proved to be in his handwriting.

[10] How is signature or handwriting on a document proved? Augustine Paul FCJ in *Evidence: Practice and Procedure* (4th Ed, LexisNexis) at p 667, citing Sarkaria J's judgment in *State (Delhi Administration) v Pali Ram* AIR 1979 SC 14 at p 20 said that similar to the Indian Evidence Act and English Law, the Evidence Act 1950 recognises two direct methods of proving a person's signature or handwriting, namely: (a) by the admission of the person who wrote the signature or writing; or (b) the evidence of a witness who saw the

person sign or write the document. He said that a signature may also be proved; (c) by the evidence of a handwriting expert (s 45 of the Evidence Act 1950); (d) by the evidence of a witness acquainted with the handwriting of the person with the handwriting of the person by whom it is supposed to have been written or signed (s 47 of the Evidence Act 1950); (e) opinion formed by the court on comparison made by itself (s 73 of the Evidence Act 1950); and (f) by circumstantial evidence: per Abdoolcader FJ in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at pp 277–278 (FC). Augustine Paul FCJ further wrote, citing the case of *Estate of Loh Ah Tong Loh Siew Lan v Tan Ah Eng* [1949] Supp MLJ 33, that a signature can be proved or disproved by the same methods.

[11] *The 16 March letter and the 19 March letter*: contrary to the denial in his defence, the defendant admitted during the trial that he had signed the 16 March letter and the 19 March letter. The defendant also agreed under cross-examination that both letters have not been revoked and that the parties have not signed any other agreements between them. The defendant's testimony on this issue was not challenged by his counsel.

[12] *The surat aku janji*: the plaintiff had testified that the defendant wrote the *surat aku janji* with his own handwriting and that he had signed the *surat aku janji* with his initial. During the defendant's examination-in-chief, his counsel asked the defendant to explain what the plaintiff meant by the handwriting. The defendant replied that he had handwritten the *surat aku janji* at the time when he met PW2, PW3 and PW4 at De Palma Hotel.

[13] The defendant admitted during the trial that he had handwritten and signed the *surat aku janji* consciously ('dalam keadaan sedar'). The defendant's testimony on this issue was not challenged by his counsel.

[14] As the defendant admitted during the trial that he had signed the 16 March the 19 March letters, and that he handwritten and signed the *surat aku janji*; accordingly, it is directly proven through the defendant's admission, that the defendant had signed the 16 March letter and the 19 March letter and that he had handwritten and signed the *surat aku janji*.

[15] Therefore, on the first issue to be tried, this court finds that the defendant had signed the 16 March letter and the 19 March letter, and that he had handwritten and signed the *surat aku janji*.

Whether the transaction between the plaintiff and the defendant is a loan or an investment?

[16] Section 73A(1) of the Evidence Act 1950 provides for the admissibility

of a statement made in a document when the maker is called as a witness in the proceedings and he had personal knowledge of the matters dealt with the statement.

[17] In this instant case, the plaintiff testified that she had prepared the 16 March letter and the 19 March letter. The defendant admitted that he had signed the 16 March letter and the 19 March letter and that his signature on both letters were witnessed by his wife Datin Hjh Noraidah bt Hj Rahmat. The defendant admitted that he had handwritten and signed the *surat aku janji*.

[18] In the 16 March letter, the defendant admits to receiving as a personal loan from the plaintiff, the sums of RM1,920,000 and RM450,000. The 16 March letter reads as follows:

> DATO HJ KHAIRUL ANWAR BIN HJ SHAHRUDDIN
>
> No 4.01 Jalan Padi Emas 1 UDA Business Centre Bandar Baru UDA
>
> 81200 Johor Baru Johor
>
> 16 March 2019
>
> SHUHADA BINTI ALANG SHUKOR No 8, Jln BM 7/19
>
> Bandar Bukit Mahkota 43000 Kajang Selangor
>
> Tuan/Puan
>
> AKUAN PENERIMAAN PINJAMAN PERIBADI DARIPADA SHUHADA BINTI ALANG SHUKOR
>
> Merujuk perkara di atas saya DATO HJ KHAIRUL ANWAR BIN HJ SHAHRUDDIN (NO KP 861101–23–6667) dengan ini mengaku telah menerima sejumlah wang sebanyak:
>
> 1. Ringgit Malaysia Satu Juta Sembilan Ratus Dua Puluh Ribu (RM1,920,000.00); dan
> 2. Ringgit Malaysia Empat Ratus Lima Puluh Ribu (RM450,000.00) (selepas ini disebut sebagai Pinjaman tersebut)
>
> daripada SHUHADA BINTI ALANG SHUKOR (No. KP 680501–075458.
>
> Sehingga surat ini ditandatangani oleh saya, Pinjaman tersebut masih belum dijelaskan oleh saya kepada Puan SHUHADA BINTI ALANG SHUKOR.
>
> Saya dengan ini mengisytiharkan bahawa sekiranya saya meninggal dunia Pinjaman tersebut hendaklah dijelaskan oleh waris waris saya dan Pinjaman tersebut hendaklah dijelaskan oleh waris waris saya terlebih dahulu kepada Puan SHUHADA BINTI ALANG SHUKOR sebelum pembahagian harta pusaka dibuat.
>
> Saya beraku janji untuk menandatangani Perjanjian Pelaburan atau Perjanjian Usahasama dengan Puan SHUHADA BINTI ALANG SHUKOR atau

mana-mana pihak yang dinamakan oleh beliau bagi menguruskan pembayaran balik Pinjaman tersebut. Sehingga satu perjanjian khusus ditandatangani Puan SHUHADA BINTI ALANG SHUKOR berhak membuat tuntuan terhadap Pinjaman tersebut berdasarkan perakuan saya di dalam surat ini.

Sekian terima kasih

Yang benar,

DATO HJ KHAIRUL ANWAR BIN HJ SHAHRUDDIN (No KP 861101–23–6667

[19] In the 19 March letter, the defendant admits to receiving as a personal loan from the plaintiff, the sum of RM474,000. The 19 March letter reads as follows:

DATO HJ KHAIRUL ANWAR BIN HJ SHAHRUDDIN

No 4.01 Jalan Padi Emas 1 UDA Business Centre Bandar Baru UDA

81200 Johor Baru Johor

19 March 2019

SHUHADA BINTI ALANG SHUKOR No. 8, Jln BM 7/19

Bandar Bukit Mahkota 43000 Kajang Selangor

Tuan/Puan

AKUAN PENERIMAAN PINJAMAN PERIBADI DARIPADA SHUHADA BINTI ALANG SHUKOR

Merujuk perkara di atas saya DATO HJ KHAIRUL ANWAR BIN HJ SHAHRUDDIN (NO. KP 861101–23–6667) dengan ini mengaku telah menerima sejumlah wang sebanyak:

1. Ringgit Malaysia Empat Ratus Tujuh Puluh Empat Ribu (RM474,000.00)

(selepas ini disebut sebagai Pinjaman tersebut)

daripada SHUHADA BINTI ALANG SHUKOR (No. KP 680501–075458.

Sehingga surat ini ditandatangani oleh saya, Pinjaman tersebut masih belum dijelaskan oleh saya kepada Puan SHUHADA BINTI ALANG SHUKOR.

Saya dengan ini mengisytiharkan bahawa sekiranya saya meninggal dunia Pinjaman tersebut hendaklah dijelaskan oleh waris waris saya dan Pinjaman tersebut hendaklah dijelaskan oleh waris waris saya terlebih dahulu kepada Puan SHUHADA BINTI ALANG SHUKOR sebelum pembahagian harta pusaka dibuat.

Saya beraku janji untuk menandatangani Perjanjian Pelaburan atau Perjanjian Usahasama dengan Puan SHUHADA BINTI ALANG SHUKOR atau mana-mana

pihak yang dinamakan oleh beliau bagi menguruskan pembayaran balik Pinjaman tersebut. Sehingga satu perjanjian khusus ditandatangani Puan SHUHADA BINTI ALANG SHUKOR berhak membuat tuntuan terhadap Pinjaman tersebut berdasarkan perakuan saya di dalam surat ini.

Sekian terima kasih

Yang benar,

DATO HJ KHAIRUL ANWAR BIN HJ SHAHRUDDIN (No. KP 861101–23–6667

[20] In the *surat aku janji*, the defendant handwrote the statement that after deducting the amount already paid, the amount that remains to be paid is RM2,764,200. He stated that he will pay the said amount by 2 July 2019. The *surat aku janji* reads as follows:

Perbincangan hari ini Ahad 23 Jun 2019

Jumlah yang sebetulnya mengikut pada Agreement Perjanjian yang terkini dan ditolakkan dengan jumlah yang sudah diberi selepas tandatangan agreement. Jumlah yang perlu dibayar RM2,764,200.00.

Akan dibayar pada 2 Julai 2019.

[21] Accordingly, based on the statements in the 16 March letter, the 19 March letter and the *surat aku janji*, the defendant's admission during the trial, and the fact that no *perjanjian pelaburan* or *perjanjian usahasama* was entered between the plaintiff and the defendant; on the second issue to be tried, this court finds that the transaction between the plaintiff and the defendant is a loan.

Whether the defendant still owes the plaintiff the sum of RM2,764,200?

[22] The plaintiff testified that she had given a personal loan to the defendant in the sum of RM2,844,000. She disagreed under cross-examination by the defendant' counsel that she had given only the defendant the sum of RM1.3m for investment. She also disagreed that the defendant had paid her back the sum of RM1,220,798.

[23] The plaintiff testified that she had given the sum of RM2,844,000 to the defendant through internet banking transfers and in cash.

[24] PW2, who is the plaintiff's husband, during cross-examination also disagreed that the plaintiff had only given the defendant the sum of RM1.3m. He disagreed the sum was given to the defendant as an investment and not a personal loan.

[25] PW2 testified that the sum of RM2,844,000 was given to the defendant partly through bank transfers and partly by cash, which was given to the defendant directly.

[26] Both the plaintiff and PW2 denied that they had forced the defendant to sign the 16 March letter, the 19 March letter and the *surat aku janji*.

[27] In final paras of both the 16 March letter and 19 March letter, the defendant states that he undertook to execute an investment agreement ('perjanjian pelaburan') or a joint venture agreement ('perjanjian usahasama') with the plaintiff or any party named by the plaintiff to manage the repayments of the said loans. He also states that until a specific agreement is executed, the plaintiff is entitled to make a claim towards the loan based on his admission in the said letters.

[28] It is not disputed that no investment agreement or joint venture agreement has been entered between the defendant and the plaintiff or a party named by her.

[29] Moreover, the defendant had agreed in the *surat aku janji* that the amount payable to the plaintiff is RM2,764,000. Additionally, under cross-examination, the defendant agreed that the amount payable to the plaintiff is RM2,764,000. He also admitted that although he undertook to pay the sum of RM2,764,000 by 2 July 2019 in the *surat aku janji*, he has not made paid the said sum to the plaintiff.

[30] Accordingly, for these reasons, on the third issue to be tried, this court finds that the defendant still owes the plaintiff the sum of RM2,764,200.

FINDINGS OF COURT

[31] Pursuant to s 101 of the Evidence Act 1950, the onus is on the plaintiff to prove her claim that she had given the defendant the sum of RM2,844,000 as a loan and not as an investment; and that the defendant still owes the plaintiff the sum of RM2,674,200. It is settled law that the standard of proof for civil cases is a balance of probabilities: see *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584; [2015] 5 AMR 584 (FC).

[32] Both the plaintiff and PW2 had testified in court that the plaintiff had given to the defendant the sum of RM2,844,000 and that the sum was given to the defendant through internet banking transfers and in cash.

[33] Furthermore, both the plaintiff and PW2 testified that the sum of RM2,844,000 was given as a personal loan to the defendant and not as an investment.

[34] The defendant admitted in the 16 March letter that he had received the sums of RM1,920,000 and RM450,000 as a personal loan from the plaintiff. And the defendant admitted in the 19 March letter that he had received the sum of RM474,000 as a personal loan from the plaintiff. Accordingly, based on the defendant's admissions in both letters, he had received in total the sum of RM2,844,000 from the plaintiff as a personal loan.

[35] The defendant admitted that he had signed both the 16 March letter and the 19 March letter and that his wife had witnessed his signature on both letters.

[36] The defendant also admitted that he had handwritten and signed the *surat aku janji* in the presence of PW2, PW3 and PW4. The defendant stated in the *surat aku janji* that the sum payable is RM2,764,200 and that he will pay the sum payable by 2 July 2019. He admitted that he has not yet paid the sum of RM2,764,200 to the plaintiff.

[37] Based on the reasons above, this court finds that the plaintiff has proven on a balance of probabilities that:

(a) the plaintiff had given the defendant the sum of RM2,844,000 as a loan and not as an investment;

(b) the defendant had signed the 16 March letter, the 19 March letter and the *surat aku janji*; and

(c) the defendant still owes the plaintiff the sum of RM2,674,200.

ISSUES RAISED POST-TRIAL BY THE DEFENDANT'S COUNSEL

[38] After trial had concluded, learned counsel for the defendant, Encik Mohd Ashri Rais, raised in his written submissions, two new issues that were not pleaded by the defendant in his defence and which were not put to the plaintiff or any of her witnesses during the trial. These two new issues are: (a) whether the transaction is in breach of s 137(1) of the Financial Services Act 2013 ('the FSA'); and (b) if the transactions are in breach of the FSA, whether the plaintiff is prohibited from claiming the sums from the defendant.

[39] Encik Mohd Ashri quoted paras 10 and 18 of Azizul Adnan J's judgment in *Sarwan Singh Kundan Singh v Aminah Faudzar* [2019] MLJU 1407; [2019] 1 LNS 1718; [2019] AMEJ 1431, and submits that the act of

the parties of paying and returning the monies is in breach of the s 137(1) of the FSA and s 24 of the Contracts Act 1950 and that the parties' intention was to avoid the law relating to financial services and money lenders. He argues that therefore, the plaintiff is not entitled to enforce any payment that she has made to the defendant.

[40] Encik Mohd Ashri, however, did not to bring to this court's attention to s 270 of the FSA, which expressly provides that a contract, arrangement of agreement entered in breach or contravention of any of the provision of the FSA shall not be void by reason of the breach or contravention. He also left out from his written submissions the fact that Azizul Adnan J in *Sarwan Singh* had expressly stated in para 30 of his judgment that 's 270 of the FSA itself contemplates that the mere fact that a contract has been entered into in breach of the FSA would not render the contract void'. Section 270 of the FSA reads as follows:

> 270 Breach or contravention not to affect contract, agreement or arrangement
>
> Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into in breach or contravention of any provision of this Act shall be void solely by reason of such breach or contravention:
>
> Provided that nothing contained in this section shall affect any liability of any person for any administrative, civil or criminal actions under this Act in respect of such breach or contravention.

[41] As regards his submission that the transaction between the plaintiff and the defendant is in breach of s 24 of the Contracts Act 1950, again Encik Mohd Ashri did not bring to this court's attention that in *Sarwan Singh*, the learned judge applied the principles established in the UK Supreme Court case of *Patel v Mirza* [2016] UKSC 42, which principles were accepted in Malaysia by the Federal Court in *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141; [2019] 1 CLJ 183. In *Sarwan Singh*, Azizul Adnan J held that it does not necessarily follow that the agreement was void as a consequence of breaching s 137 of the FSA and that the defendant, in that case, would be precluded from recovering the amounts she had deposited with the plaintiff. His Lordship held in paras 30(b) and 31 of his judgment:

> (b) section 270 of the FSA itself lends support to the proposition that the purpose of section 137 is not to deny depositors the ability to claim back their deposits from illegal deposit-taking schemes, but rather to ensure that persons who do take deposits from the public are adequately regulated and subject to appropriate capital and disclosure requirements. Using the rubric of Lord Toulson JSC (in *Patel v Mirza*), the underlying purpose of the prohibition of section 137 has not been transgressed in this case
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> ...
>
> [31] For completeness, I observe that *Patel v Mirza* can be reconciled with and

accommodated within the scheme of the Contracts Act 1950 by virtue of section 24(e) of the Contracts Act 1950. In determining whether an object or consideration is unlawful, regard must be had to public policy considerations, and the trio considerations of Lord Toulson JSC provide a useful guide as to how those public policy considerations are to evaluated in a particular case.

[42] It is clear from s 270 of the FSA and the High Court's judgment in *Sarwan Singh* that a contract in breach or in contravention of any provision of the FSA, is not void solely by reason of such breach or contravention, and thus, would not prevent the plaintiff from recovering the monies she had loaned to the defendant — which is the polar opposite of what Encik Mohd Ashri had submitted to this court.

[43] More fundamentally, both these issues were not pleaded by the defendant in his defence. The defendant's counsel had also raised an allegation in his submissions that the defendant was forced to sign both the 16 March and 19 March letters. Again, like the two new issues, this allegation was never pleaded in the defence.

[44] It is trite law that parties are bound by the pleadings and are not allowed to adduce facts and issues that were not pleaded: see *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ Rep 330 (SC); *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944; [2018] 3 AMR 259 (FC); *The Carbon Co Sdn Bhd & Anor v Ng Lee Hoon (conducting under 'Forest Wood Flooring')* [2017] 4 MLJ 791; [2017] 6 CLJ 189 (CA). Ramly Ali FCJ in the Federal Court's judgment in *Samuel Naik Siang Ting v Public Bank Bhd* held:

> [29] *It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded* ...
>
> [33] The issue raised, if accepted, would completely change the character of the appellant's defence to the respondent's claim and would be highly prejudicial to the respondent's case. (Emphasis added.)

[45] Similarly, in this instant case, if this court was to accept the unpleaded issues and allegation raised by defendant's counsel in his submissions post-trial, it would completely change the character of the defendant's defence to the plaintiff's claim and would be highly prejudicial to the plaintiff's claim. For this reason, both the unpleaded issues and allegation are rejected.

DECISION

[46] Accordingly, for the reasons above, this court hereby enters judgment for the plaintiff against the defendant and hereby orders:

A (a) that the defendant pays the plaintiff the sum of RM2,764,200 within seven days of service of the sealed judgment;

(b) that the defendant pays the plaintiff interest at the rate of 5%pa on the sum of RM2,764,200 from the date of the writ until full settlement;

B (c) the sealed judgment be endorsed with a penal notice pursuant to O 45 r 7 of the Rules of Court 2012; and

(d) cost of RM10,000 to be paid by the defendant to the plaintiff subject to the payment of the allocatur fee.

C *Plaintiff's claim allowed and judgment entered against the defendant.*

Reported by Nuzul Fitrie

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